

Criminal Appeal No.945-SB of 1998.

**IN THE HIGH COURT FOR THE STATES OF PUNJAB & HARYANA
AT CHANDIGARH**

...

Criminal Appeal No.945-SB of 1998.

Date of Decision: December 23, 2009.

Dhiru alias Manbir

...Appellant

VERSUS

State of Haryana

...Respondent

1. Whether the Reporters of Local Newspapers may be allowed to see the judgment ?
2. To be referred to the Reporters or not ?
3. Whether the judgment should be reported in the Digest ?

CORAM :HON'BLE MR. JUSTICE MOHINDER PAL.

Present: Mr.Nikhil Batta, Advocate,
Amicus Curiae,
for the appellant.

Ms. Sushma Chopra, Additional Advocate General,
Haryana.

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MOHINDER PAL, J.

This appeal is directed against the judgment of conviction and the sentence order dated 5.11.1998 passed by the learned Additional Sessions Judge, Narnaul, whereby Dhiru alias Manbir (appellant) was convicted under Section 376 read

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with Section 511 of the Indian Penal Code (hereinafter referred to as 'the Code') and sentenced to undergo rigorous imprisonment for three years and to pay fine of Rs.2,000/-, in default whereof to undergo further rigorous imprisonment for three months.

The instant F.I.R was registered against the appellant on the basis of the statement made before the police by the prosecutrix, a married lady, (name withheld) wherein she stated that on 1.10.1997 at about 10 A.M, when she was present alone at her house, the appellant came to her house; that he took her in the 'Bara' where the lambs were confined; that thereafter he took her in the 'Turi Wala Chappar' and stripped her, gagged her mouth, made her lie on the ground and tried to commit rape upon her; and that she resisted and cried for help. She further stated that, in the meanwhile, her mother Smt. Maina Devi came after collecting the fodder from the fields and that on seeing Smt. Maina Devi the appellant ran away from the spot. Smt. Mafia, aunt of the prosecutrix, her uncle Maksud and Dharambir, who had been attracted to the spot, had seen the appellant running away from the spot.

After completion of investigation, challan was presented against the appellant in Court.

The accused was charged under Section 376 read with Section 511 of the Code. He did not plead guilty to the charge and claimed trial.

In order to prove its case, the prosecution examined

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Sub Inspector Balbir Singh (P.W.1), Constable Bhim Singh (P.W.2), Constable Mahesh Kumar (P.W.3), Smt. Maina (P.W.4), Dharambir (P.W.5), Smt. Mafia (P.W.6) and Assistant Sub Inspector Sube Singh (P.W.7).

Statement of the accused-appellant was thereafter recorded under Section 313 of the Code of Criminal Procedure wherein he denied the prosecution allegations and pleaded innocence. The appellant examined Amar Singh (D.W.1) and Gaje Singh (D.W.2) in his defence. Both the defence witnesses stated that the prosecutrix was mentally deranged from her childhood; that the mother of the accused had lent Rs.5000/- to the mother of the prosecutrix; and that a dispute arose between them regarding this transaction. They further stated that to take revenge from the mother of the accused, the mother of the prosecutrix got the accused challaned in this case falsely.

I have heard the learned counsel for the parties and have gone through the records of the case.

In this case the prosecutrix has not been examined. Smt. Maina (P.W.4), mother of the prosecutrix, in her cross-examination stated that the prosecutrix was married about two years prior to the occurrence; that she stayed at her matrimonial house only for a night; that the prosecutrix was willing to go to her matrimonial house; that they were interested to send the prosecutrix to her matrimonial house and that the husband of the prosecutrix was also willing to take her. Smt. Maina (P.W.4), admitted that the prosecutrix was mentally deranged.

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After hearing the learned counsel for the parties and going through the evidence on record, I am of the considered opinion that it was a case of attempted sexual intercourse falling within the definition of Section 376 read with Section 511 of the Code. The evidence of Smt. Maina (P.W.4), Dharambir (P.W.5) and Smt. Mafia (P.W.6) establishes the case of the prosecution against the appellant. Smt. Maina (P.W.4), mother of the prosecutrix, stated that when she returned from the fields after collecting fodder, she heard the 'raula' and went to the place of occurrence where she found the prosecutrix lying naked. The appellant had also put off one of his trousers. He was trying to commit rape upon the prosecutrix. On seeing Smt. Maina, the appellant ran away from the spot. Dharambir (P.W.5) and Smt. Mafia (P.W.6), who had been attracted to the spot on hearing the noise, had witnessed the appellant running away from the spot while chaining / zipping his Pants. No doubt Smt. Maina (P.W.4) has admitted in her cross-examination that the prosecutrix was mentally deranged and, thus, obviously unable to get her statement recorded before the police, but keeping in view the facts and circumstances of the case this fact hardly affects the veracity of the prosecution version. As the prosecutrix was not examined by the prosecution, it shows that she was not capable of deposing before Court. In offences like the present one, the prosecutrix is the main and key witness because she being the victim can narrate the incident. As noticed above, besides the prosecutrix, in this case there

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is evidence of Smt. Maina (P.W.4), Dharambir (P.W.5) and Smt. Mafia (P.W.6), discussed above, which connects the accused with the crime. There was no hindrance for the mother of the prosecutrix to get the First Information Report recorded in this case by making her statement before the police. It appears that in fact Smt. Maina had narrated the facts before the Investigating Officer, but the Investigating Officer, with an object to help the accused, got the thumb impression of the prosecutrix on the statement (Exhibit P.A) knowing fully well that she (prosecutrix) was mentally deranged. The Investigating Officer ought to have recorded the First Information Report on the statement of Smt. Maina if the prosecutrix was not in a position to explain the things because of her mental incapability and there would not have been anything illegal in it. If the Investigating Officer got the thumb impression of the prosecutrix on the statement (Exhibit P.A), it does not at all demolishes the prosecution case, which stands otherwise proved on record, as discussed above. A fault committed by the police official cannot be made the basis for not bringing the culprit to book and the facts and circumstances on record, in totality, form the basis for the Courts to reach to a correct conclusion. Had Smt. Maina (P.W.4), mother of the prosecutrix, not arrived at her house timely, the appellant would have been able to commit rape upon the prosecutrix. The appellant had no business to go to the house of the prosecutrix when she was alone. The facts and circumstances of the case, enumerated above, suggest that the

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appellant had gone to the house of the prosecutrix to commit rape on her taking advantage of the fact that she was mentally regarded.

In view of the above, the prosecution has been able to bring home the guilt of the accused beyond all reasonable doubts under Section 376 read with Section 511 of the Code. Therefore, no interference is called for in the impugned judgment of conviction and the sentence order. Resultantly, this appeal is hereby dismissed.

December 23, 2009.
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(MOHINDER PAL)
JUDGE